Cheah Kim Tong & Anor v Taro Kaur

HIGH COURT (IPOH) - CIVIL SUIT NO 22-31-86
PEH SWEE CHIN J
21 APRIL 1989

Civil Procedure - Injunction - Interlocutory mandatory injunction sought - Special circumstances - Undertaking as to damages - Whether necessary - Acquiescence - Equitable estoppel - Laches

Land Law - Encumbrances - Trespass - Encroachment of defendant's building onto plaintiffs' land - Whether encroachment an encumbrance.

Limitation - Continuing trespass to land - Accrual of cause of action - Adverse possession - Limitation Act 1953, s 9 - National Land Code 1965, s 34

Tort - Trespass to land - Whether actionable per se

Words and Phrases - 'Laches' - 'Acquiescence'

The plaintiffs who were the registered owners of a piece of land brought an action against the defendant in which they alleged that the defendant's house was encroaching on their land. The plaintiffs made an interlocutory application by summons-in-chambers for an order that the defendant do remove the encroaching portion of her house and be restrained from trespassing onto the plaintiffs' land and for an order for damages and costs. The defendant raised the issue of estoppel and acquiescence. The defendant alleged that her house was built in 1968 and that the plaintiffs had become the registered owners only in July 1980 and that the previous owner of the plaintiffs' land had never raised the issue of encroachment. The next point taken for the defendant was that the plaintiffs should have made a search at the Land Office at the time of their purchase of their land to find out if it was free from encumbrances. It was also contended for the defendant that the action was barred by limitation under s 9(1) of the Limitation Act 1953. It was also contended for the defendant that the damage suffered by the plaintiffs was negligible or trivial and that there was no damage at all. In addition to limitation, laches was pleaded by the defendant in that the plaintiffs first raised the question of encroachment in September 1980 but filed the action in February 1986. To this the plaintiffs replied that negotiations had been going on between the parties and time had been given to the defendant to remove the encroachment and that it was unfair for the defendant now to say that the plaintiffs had delayed filing the action. Lastly, it was submitted for the defendant that it would produce a very unfair result to the defendant if a mandatory injunction of the nature asked for was granted.

Held, allowing the application:

(1) It was never even alleged that the previous owner of the plaintiffs' land had behaved in any way or spoken in any way that such equitable estoppel as was relied on by the defendant had arisen against the previous owner and therefore the plaintiffs, the present owners. It did not appear to be disputed that the plaintiffs had not acted in any way to be so estopped from asserting their rights as owners.

(2) The Registrar of Titles would not register an encumbrance such as an encroachment of one's building on another's land and the alleged failure of the plaintiffs to make a search at the Land Office was therefore no defence.

(3) This was a case of a continuing trespass. In the case of a continuing trespass a fresh cause of action arises di die in diem, ie from day to day.

(4) By virtue of s 9(2)(b) of the Limitation Act and s 341 of the National Land Code 1965, which provides, inter alia, that adverse possession of land shall not constitute a bar for any length of time to the bringing of any action by the proprietor, the defence of limitation failed.

(5) Any trespass, as in this case, was even actionable per se, ie without any necessity to prove actual damage. The damage or injury suffered by the plaintiffs in this case was in fact very serious.

(6) Time appeared to have been given to the defendant to remove the encroachment. Having regard to the nature of the trespass and to the correspondence, there was no inordinate delay in filing the present action. 'Laches' means definitely something more than a mere delay. It means such delay amounting to acquiescence. Here, the word 'acquiescence' is not quite the same acquiescence as used in equitable estoppel, where generally a plaintiff stands by watching a violation of his right and keeping silent, but here, there is a complete violation of a right and a plaintiff has become aware of it. He either assents to it or his delay in asserting his right has been so long as to give rise to an inference of such assent. Regard must be had to the change in a defendant's position which has resulted from a plaintiff's delay in bringing an action. On the facts in the instant case the plaintiffs had not been guilty of laches in the sense just stated. The defence of laches would not have applied in any event on the basis of s 9 of the Limitation Act for the plaintiffs should be entitled to the full statutory period of 12 years provided in the section before their claim became unenforceable.

(7) The injury done to the plaintiffs could not be adequately compensated for by damages, and the injury was so serious in the circumstances of this case that the restoration of the condition before the encroachment took place would be the only way to do justice sufficiently to the plaintiffs. A mandatory injunction can be granted on an interlocutory application before trial when there are special circumstances, which existed in this case. It was not appropriate to impose a condition providing for the usual undertaking as to damages as the case ought to be decided at once, it being so clear and beyond doubt.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-147-89.]

Cases referred to

1 *Re Pauling's Settlement Trust, Younghusband* v *Coutts & Co* [1962] 1 WLR 86 (folld)
2 *Tan Tuan Kiat & Anor* v *Pritam Singh Brar* [1987] 1 MLJ 276 (folld)
3 *Shephard Homes* v *Sandham* [1971] Ch 340 (refd)
4 *Charrington* v *Simons & Co* [1970] 1 WLR 725 (refd)
5 *Kelk* v *Pearson* (1871) 6 Ch App 809 (folld)
6 *Smith* v *Smith* (1875) 20 LR Eq 500 (folld)
7 *Allport* v *Securities Corp* (1895) 64 LJ Ch 491 (folld)

Legislation referred to

Limitation Act 1953 s 9
National Land Code 1965 ss 340, 3401

Choy Kam Lee for the plaintiffs.
R Naidu for the defendant.

Cur Adv Vult

Peh Swee Chin J: The plaintiffs, the registered owners of land held under grant no 17875 for lot no 781, in the mukim of Bidor, (hereafter called 'the lot 781') filed an action claiming an order for injunction for the defendant to remove part of the defendant's house encroaching on lot 781 and for damages for trespass, etc; the defendant being the holder of a temporary occupation licence issued by the relevant land office covering adjoining lots 777 and 779 in the same mukim of Bidor; as well as being the owner of a building built substantially of wood and partly of concrete erected on lots 777 and 779, ie the adjoining lots.

By summons-in-chambers (encl 7), the plaintiffs asked that the defendant do remove the encroaching portion of the house, and be restrained from trespassing and further asked for damages and costs.

At the end of hearing of submission from both counsel, the court granted an order in terms stated above except that the time for removing the encroachment be four months, failing which the plaintiffs be at liberty thereafter to remove the same at the cost and expense of the defendant from whom the plaintiffs be entitled to recover such cost and expense, and further that the damages, if any, be assessed by the learned registrar of this court, and be paid to the plaintiffs. I now give my reasons in writing.

Despite the denial of the defendant in regard to the said encroachment, a survey report filed by the defendant himself showed the encroachment and such denial was therefore devoid of merit.

The first issue raised by the defendant was estoppel and acquiescence. This expression, 'estoppel and acquiescence' is apt to give rise to some confusion unless one bears in mind that the acquiescence is an element in the estoppel which is an equitable one. Learned counsel for the defendant, in this connection submitted that the house was built in 1968 and that the plaintiffs had become the registered owners only in July 1980. Scrutiny of the defendant's affidavit in this connection also showed that the previous owner of the plaintiffs' land had never raised any issue of the encroachment.

Such was the scanty material on which the defence of equitable estoppel depended. The court perused the document of title of lot 781 and the previous registered owner who might possibly had been guilty of words or conduct giving rise to such equitable estoppel was one Soundaram d/o Karupan Chettiar who was such owner from 20 December 1956 to July 1980 when the plaintiffs became the registered owner. It was never even alleged that the said Soundaram had behaved in any way or spoken in any way that such equitable estoppel as was relied on by the defendant had arisen against her, and therefore the plaintiffs, the present owners. It did not appear to be disputed that plaintiffs had not acted in any way to be so estopped from asserting their rights as owners. It would be wrong and also imposing an impossible burden on this court to imagine or suggest how the said Soundaram (whose name was never even mentioned by the defendant) had conducted herself in certain ways with regard to this equitable estoppel. The defence based on it therefore failed.

Next, it was submitted on behalf of the defendant that the plaintiffs should have made a search in the land office (or rather the Registry of Titles, Perak) at the time of purchase of lot 781 to find out if lot 781 was free from an encumbrance. The short answer would be too obvious; the Registrar of Titles would not register an encumbrance such as encroachment of one's building on another's land.

Next, it was submitted that the plaintiffs' action was barred by limitation of time, ie s 9(1) of the Limitation Act 1953. Section 9(1) provides:

> No action shall be brought by any person to recover land after the expiration of twelve years from the date on which the right of action accrued to him, or it first accrued to some person through whom he claims, to that person.
>
> (2) Nothing in this section ... shall be deemed to apply.
> (a) ...
> (b) to any person registered under or by virtue of the provision of the National Land Code ... as the proprietor of the land sought to be recovered or to any person claiming through a person so registered, except to the extent that such Code ... provides or permits.

Learned counsel for the plaintiffs submitted that the trespass was a continuing one, and still continued. I agree with the submission about the continuing trespass. In a continuing trespass a fresh cause of action arises di die in diem, ie from day to day. This would alone dispose of the defendant's contention.

However, the defendant had raised s 9 of the Limitation Act 1953, but he forgot to mention s 9(2)(b) set out above. The corresponding section in the National Land Code for the s 9(2)(b) of the Limitation Act 1953 must be s 341 of the National Land Code which provides as follows:

> 341 Adverse possession of land for any length of time shall not constitute a bar to the bringing of any action for the recovering thereof by the proprietor or any person or body entitled to or interest therein and accordingly, the Limitation Ordinance 1953, shall in no circumstances operate to extinguish any title to or interest in land.

Section 341 of the National Land Code speaks for itself. Quite apart from the aspect of limitation of action, this s 341 would appear to reinforce and strengthen the principle of indefeasibility of title as enshrined in the foregoing s 340 of the National Land Code.

Next it was submitted that the damage to the plaintiffs was negligible or trivial and there was no evidence of damage at all. The short answer would be that any tres-

pass, as in this case, was even actionable per se, ie without any necessity to prove an actual damage. For reasons I will give later, the damage or injury was in fact very serious to the plaintiffs.

In addition to limitation, learned counsel for the defendant also pleaded laches by submitting that the action was filed in February 1986 when the plaintiffs first raised the question of encroachment in correspondence in September 1980. Learned counsel for the plaintiffs' reply was that negotiation had been going on between the parties and time had been given to the defendant to remove the encroachment and that it was unfair for the defendant now to say that the plaintiffs had delayed filing the action.

The plaintiffs became owners in 1980 and on 18 September 1980, the plaintiffs wrote requesting the defendant to remove the encroachment. On 6 October 1980, a Member of Parliament took up the matter for the defendant and wrote to the plaintiffs' solicitors asking for three month's time to remove it. Time appeared to have been given to the defendant. Having regard to the nature of the trespass, and the correspondence, I did not think there was any inordinate delay in filing the present action on the facts.

The word 'laches' is one of the most over-worked words in legal arguments before the courts and it does not seem to have been fully appreciated for its nature. It means definitely something more than a mere delay; it means such delay amounting to acquiescence. Here the word acquiescence is not quite the same acquiescence as used in equitable estoppel, where, generally a plaintiff stands by watching a violation of his right in progress and keeping silent, but here, there is a completed violation of a right and a plaintiff has become aware of it. He either assents to it, or his delay in asserting his right has been so long as to give rise to an inference of such assent. Regard must be had to the change in a defendant's position which has resulted from a plaintiff's delay in bringing an action. On the facts in the instant case the plaintiffs had not been guilty of laches in the sense just stated, though I had a suspicion that counsel was speaking merely of mere inordinate delay.

However, in this case, the court also observed that there was a provision of a statutory bar, ie s 9 of the Limitation Act 1953, and the defence of laches would not have applied in any event for the plaintiffs should be entitled to the full statutory period before their claim became unenforceable. Please see Re *Pauling's Settlement Trusts, Younghusband* v *Coutts & Co*[1] at p 115 and *Tan Tuan Kiat & Anor* v *Pritam Singh Brar*.[2]

Lastly it was submitted that it would produce a very unfair result to the defendant if a mandatory injunction of the nature asked for was granted. Counsel cited the Singapore case of *Tay Tuan Kiat & Anor* v *Pritam Singh Brar*.[2] In that case, the plaintiff built an almost perpendicular retaining wall at a slope near the common boundary, occupying an area of approximately 11.8 sq m of the plaintiff's land there. The defendant there also built (a) a chainlink fence along the edge on top of the retaining wall, the fence being then on the plaintiff's land, and (b) a hut, part of which also stood on the plaintiff's land. Thean J held, adopting the concept of 'fair result' relied on by Megarry J in *Shephard Homes Ltd* v *Sandham*[3] and by Buckley J in *Charrington* v *Simons & Co Ltd*,[4] that it would be inequitable to order the demolition of the retaining wall after considering various relevant factors in that case but ordered the removal of the chainlink fence from the plaintiff's land to the common boundary, and further ordering the demolition of the hut; $500 as nominal damages, and two-thirds of the costs.

The learned counsel for the plaintiffs in the instant case tried to persuade the court that the Singapore case was distinguishable, for in that case the facts were different from those in *Tay Tuan Kiat*.[2] In my view the details of facts in both cases might be different, but the situations and infringement of plaintiffs' rights were broadly similar, except for two significant facts. First, the defendant's land was held under 'TOL' renewable from year to year carrying no legally recognizable right to any document of title while that of the plaintiffs was covered by a grant in perpetuity. Secondly, the plaintiffs' vacant land was subject to an express condition endorsed on the document of title, that a shophouse was to be built on the plaintiff's land which was 20 ft wide both in front and back. A width of 20 ft for a shop would be slightly less than the normal width of a shophouse and no architect would be required to assist on this. The express condition, if not fulfilled, would render lot 781 liable to forfeiture to the State Authority of Perak. The fulfilment of the express condition could become quite impossible with the defendant's largely wooden house protruding into lot 781. The concept of the fair result would be applicable in the instant case in favour of the plaintiffs.

I was fully aware that the injunction asked for in this case was a mandatory injunction, that it was being asked for on an interlocutory application, and that, if granted it would virtually be the very remedy of this civil action without a full trial.

I will deal with the special circumstances considered by the court in this connection. There was no doubt of the plaintiffs' right to possession of lot 781, and the violation of that right was not in dispute as the encroachment was admitted by the defendant from whom a survey plan showing the encroachment was filed in court in addition to that of the plaintiffs. The injury done to the plaintiffs, could not be adequately compensated for by damages, and the injury was so serious in the circumstances of this case that the restoration of the condition before the encroachment took place would be the only way to do justice sufficiently to the plaintiffs. Please see *Kelk* v *Pearson*,[5] and *Smith* v *Smith*.[6] I also thought that the case was so

clear it ought to be decided at once. Please see *Allport* v *Scientists Corp.*[7]

A mandatory injunction can be granted on an interlocutory application before trial, when there are special circumstances, which existed in this case, as stated in the above paragraph; whereby it was granted I did not think it appropriate to impose a condition providing for the usual undertaking as to damages as I decided that the case ought to be decided at once, it being so clear and beyond doubt. I therefore made an order in terms as stated earlier.

Application granted.

Solicitors: *KC Lai & Co; R Naidu & Co.*

Reported by *PS Ranjan*

N Vijaya Kumar s/o Narayanasamy v Voon Chen Lim

HIGH COURT (IPOH) - CIVIL SUIT NO 25-748-86
ABDUL MALEK J
18 MAY 1989

Damages (Personal Injury or Death) - Accident - Head-on collision - Liability of parties - Quantum of damages - Pre-trial damages - Loss of future earnings - Civil Law Act 1956, s 28A(2)(d)

Tort - Accident - Head-on collision - Liability of parties - Quantum of damages - Pre-trial damages - Loss of future earnings - Civil Law Act 1956, s 28A(2)(d)

The parties were driving in opposite directions and were involved in a road accident. Each party had insisted that the other had encroached onto his path causing the accident. The plaintiff alleged that the defendant was overtaking a motorcyclist while the defendant alleged that the plaintiff was avoiding the manholes on his side of the road.

Held, finding the defendant 80% liable:

(1) On the evidence, the court was inclined to accept the plaintiff's version as the glass pieces in the sketch plan were found on his side of the road preceding the diagonally slanting tyre marks in the plaintiff's direction. The manholes were further away in terms of the plaintiff's direction and it is highly unlikely that he would have begun to avoid them from such a long distance.

(2) The plaintiff is liable to a certain extent for not seeing the oncoming car earlier despite the fairly straight road, and in not being able to avoid the accident as he had not seen it earlier than he did.

(3) The plaintiff's evidence of his earnings was amply corroborated and the court found no reason to reject the evidence. The award for the pre-trial period of four years was $500 x 48 = $24,000.

(4) Section 28A(2)(d) of the Civil Law Act 1956 provided that the multiplier would be 16 minus the pre-trial period. In view that the plaintiff would not be in a position to obtain any employment the award of future earnings would be $500 x 12 x 12 = $72,000.

(5) The following awards were made for the injuries sustained:

(a) lacerated wound over the dorsum of the right hand with cut extensor tendons to the little and middle fingers - $9,000
(b) 10 cm long lacerated wound over the palm of the right hand and fracture of the third metacarpal of the right hand - $3,000
(c) premature wound on the right shin and fracture of the right shaft of the right tibia-fibula - $17,000
(d) lacerated wound on the right fourth toe - $2,000

Legislation referred to
Civil Law Act 1956 s 28A(2)(d)

Ranjit Singh for the plaintiff.
Jeevapragasan s/o Sambasivam for the defendant.

Cur Adv Vult

Abdul Malek J: The accident between the plaintiff's motorcycle AAA 5491 and the defendant's motorcar AAE 7691 had taken place on 7 May 1985 at about 8.30pm (not am as in the statement of claim) along Jalan Sungai Pari, Ipoh. The plaintiff was travelling from Jalan Connolly towards Buntong whereas the defendant was from the opposite direction. As is usual in collision cases between vehicles from opposite directions, each party had insisted that it was the other who had encroached onto his path causing the accident.

According to the plaintiff, the defendant's car had encroached onto his path while overtaking a motorcycle in front of it. His evidence on this point had been corroborated by the rider of that motorcycle (PW2) who had seen how the collision took place. Both maintained that there were double lines in the centre of the road. The defendant in his testimony denied the existence of a centre white line as the road had just been resurfaced and the investigating officer (PW4) was not questioned on this. Neither was this fact recorded on the sketch plan. The defendant had alleged that the plaintiff had encroached onto his path to avoid a manhole and he also admitted that he was travelling in the middle of the road.

As regards the presence of the centre lines, I was more inclined to accept the version of the defendant as he was supported by the neutral evidence of the sketch plan and also because he had admitted travelling in the middle of the road which was probably due to the non-existence of the centre lines. However, as for where the impact took place, I was more inclined to accept the version of the plaintiff as, apart from the fact of PW2's supporting evidence, the glass pieces in the sketch plan were found on his side of the road preceding the diagonally slanting tyre mark 25 ft long if one is travelling in the plaintiff's direction. This could only denote the probability of the truth of the plaintiff's version as compared to that of the defendant's. Even the defendant's witness (DW3), who had investigated into the matter, was of the opinion that the defendant was to be blamed for the accident. As for the manholes on the road, they are further away in terms of the